Supreme Court, U.S.
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No. ~~04-168~~

IN THE SUPREME COURT OF THE UNITED STATES

Joseph Lee Grimm,
Petitioner,

v.

Charles S. Spell, a.k.a. Steve Spell,
Peter Vasquez, and
Prosscovia Biribawa,
Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS RAISED for REVIEW

1. For the purpose of determining whether law is clearly established on a federal question, may the federal courts below limit their considerations to state court decisions while distinguishing federal court decisions on the basis of a "materially similar" standard in a non-diversity case?
2. Is it clearly established that the Fourth Amendment prohibits state law enforcement agents from threatening arrest and incarceration of a person resisting a warrantless, unconsented search of private dwelling premises?
3. Does the Takings Clause of the Fifth Amendment prohibit state agents from temporarily occupying private dwelling lands, for purposes of administering state regulations, without notice, hearing, or compensation to the inhabitant, while the inhabitant is being restrained?
4. Does the Equal Protection Clause of the Fourteenth Amendment prohibit state agents from employing a constructive classification as the basis for depriving someone of his fundamental rights?

PARTIES

All parties are named in the caption of the case.

CORPORATE DISCLOSURE STATEMENT

The parties to this case are individuals, and no corporate entity is named in any capacity.

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OPINIONS and ORDERS ENTERED in the CASE by the COURTS

The order of the Court of Appeals [Case No. 03-14011] affirming dismissal is designated "[DO NOT PUBLISH]" above the caption. A re-formatted reproduction of that order and opinion are included in the APPENDIX to this petition, pages A-I-1 through A-I-9.

The order of the District Court [Case No. 2:00-CV-506-FTM-29DNF] dismissing the petitioner's claims is not reported. A re-formatted reproduction of that order and opinion are included in the APPENDIX to this petition, pages A-II-1 through A-II-15.

The order of the Court of Appeals denying the petition for rehearing en banc is reproduced, re-formatted, in the APPENDIX to this petition, an un-numbered single page.

STATEMENT of BASIS for JURISDICTION

This petition is filed under Rule 10 (c) of the Rules of the Supreme Court.

On March 5, 2004, the United States Court of Appeals for the Eleventh Circuit issued an order affirming dismissal of the petitioner's claims by the United States District Court for the Middle District of Florida.

On March 23, 2004, petitioner filed a petition for rehearing en banc with the Eleventh Circuit.

On April 30, 2004, the Eleventh Circuit issued an order denying petitioner's motion for rehearing en banc.

On May 13, 2004, the order affirming dismissal was issued as mandate.

The Supreme Court has jurisdiction to review the order affirming dismissal on writ of certiorari by authority of 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, and REGULATIONS INVOLVED in the CASE

I. The Constitution for the United States of America;

the Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the the place to be searched and the persons or things to be seized.

the Fifth Amendment, in part:

No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

the Fourteenth Amendment, Section 1, in part:

No State shall make or enforce any law which shall abridge the privileges or imunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

II. The Florida Constitution of 1968:

Article I, section 12:

The right of the people to be secure in their persons, houses, papers, and effects against ureasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons to be seized, the communications to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or

information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court.

III. The Florida Statutes (2000):

§581.031

The department [Department of Agriculture and Consumer Services] has the following powers and duties: ...
(15)(a) To inspect plants, plant products, or other things and substances that may be capable of disseminating or carrying plant pests, noxious weeds, or arthropods, and for this purpose shall have power to enter into or upon any place and to open any bundle, package, or other container containing, or thought to contain, such material, and to take possession of such material if determined by the department to pose a threat to the agricultural or public interests of this state.

§581.184(7)

Upon request of the department, the sheriff of each county in the state shall provide assistance in obtaining access to private property for the purpose of enforcing the provisions of this section. The sheriff shall be responsible for maintaining public order during the eradication process and protecting the safety of department employees, representatives, and agents charged with implementing and enforcing the provisions of this section. The department may reimburse the sheriff for the reasonable costs of implementing the provisions of this section.

IV. Florida Attorney General Opinion 84-32 (April 2, 1984)

SUMMARY

A municipal code inspector is without authority to enter onto any private, commercial or residential property to assure compliance with or to enforce the various technical codes of

the municipality or to conduct any administrative inspections or searches without the consent of the owner or the operator or occupant of such premises or without a duly issued search or administrative inspection warrant. The procurement and issuance of administrative inspection warrants is governed by the provisions of ss. 933.20 - 933.30, F.S., and as to those residences a search warrant or the prior consent and approval of the owner is required.

V. Florida Administrative Code Chapter 5B-58
5B-58.001 Citrus Canker Eradication
See APPENDIX, pp. A-III-1 through A-III-10.

STATEMENT OF THE CASE

On June 19, 2000, respondents Biribawa and Vasquez, acting as agents of the Florida Department of Agriculture and Consumer Services (DACS), entered onto the curtilage of Grimm's dwelling, without notice and without consent. Biribawa informed Grimm that she and Vasquez entered Grimm's premises for the purpose of finding and inspecting citrus trees possibly infected with canker.

Upon challenge by Grimm, Biribawa admitted to having no warrant. Vasquez had already commenced conducting a search and inspection of Grimm's curtilage lands. Grimm ordered Biribawa and Vasquez to leave the premises, and they immediately departed.

On June 20, 2000, Biribawa and Vasquez returned to Grimm's premises, accompanied by respondent Spell, an armed and uniformed deputy of the Collier County Sheriff. Stopped by a locked gate, Spell sounded the siren of his patrol car, alerting Grimm to the presence of the three.

Grimm confronted Spell, Biribawa, and Vasquez and demanded an explanation for their presence on the premises.

Spell responded that he had accompanied the DACS agents for the purpose of prohibiting Grimm from interfering in their search and inspection of Grimm's curtilage lands. Grimm asked Spell if he were in possession of a warrant authorizing the search and inspection. Spell stated that he had no warrant and that no warrant is required under Florida law.

Grimm informed Spell that a warrant is required by law for such entry without consent of the inhabitant. Spell responded by threatening to arrest and incarcerate Grimm if he refused to open the gate and allow a search and inspection of the curtilage lands.

Under protest, Grimm unlocked the gate and stepped aside. Spell, Biribawa, and Vasquez immediately passed through the gate and onto Grimm's curtilage lands. Biribawa and Vasquez conducted a search and inspection of the curtilage lands while Spell stood near to Grimm and kept his right hand near his firearm.

Upon Biribawa and Vasquez's return to the gate opening, Vasquez handed some DACS documents to Grimm and threatened that he would return within about 60 days. Grimm stated to Vasquez that no entry would be permitted if no warrant were presented upon Vasquez's return.

Spell, Biribawa, and Vasquez then departed Grimm's premises.

Grimm made written notice and demand of Biribawa, Vasquez, and Spell, for remedy of torts. Counsel for Biribawa, and Vasquez, responded in writing, refusing to comply with Grimm's demands. Spell did not respond to Grimm's demands.

On November 13, 2000, Grimm filed a complaint in the United States District Court for the Middle District of Florida pursuant to 28 U.S.C. §1331 and §1343.

The complaint was twice amended with leave of court.

The Second Amended Complaint consists of three Counts against six defendants. Count I alleges violations of the Fourth, Fifth, and Fourteenth Amendments under 42 U.S.C. §1983; Count II alleges conspiracy under 42 U.S.C §1985(3); and Count III alleges neglect to prevent wrong under 42 U.S.C. §1986.

The district court dismissed with prejudice the Second Amended Complaint, finding all defendants qualifiedly immune from Grimm's claims..

Pursuant to 28 U.S.C. §1291, Grimm appealed to the Eleventh Circuit, which affirmed dismissal of Counts II and III against all appellees, affirmed dismissal of Count I against three appellees, and vacated the dismissal of Count I against Spell, Vasquez, and Biribawa. The Eleventh Circuit remanded the remaining case to the district court, mandating that the district court make a finding as to whether a constitutional violation had occurred and, only if so, to decide whether, at times material, the remaining three appellees had fair warning that their actions violated clearly established.

After the parties submitted briefs on the question of the occurrence of a constitutional violation, the district court again dismissed with prejudice the remaining Count I as to the three remaining appellees, finding that a Fourth Amendment violation was alleged but the appellees were qualifiedly immune. The district court found that the appellees had no fair notice that their actions violated clearly established law.

Grimm appealed again to the Eleventh Circuit which affirmed the district court's order.

Grimm petitioned for rehearing en banc. The Eleventh Circuit denied the petition

ARGUMENT

In the case under petition, the United States Court of Appeals for the Eleventh Circuit affirmed the dismissal with prejudice of the petitioner's claims by the United States District Court for the Middle District of Florida.

The stated grounds for the dismissal of the Fourth Amendment claims, found sufficiently pleaded in the petitioner's complaint, is qualified immunity of the respondents from petitioner's claims.

The stated grounds for dismissal of the Fifth and Fourteenth Amendment claims is insufficiency of pleading in the petitioner's complaint.

The District Court found, and the Eleventh Circuit affirmed, that respondents reasonably believed that conducting a warrantless, unconsented search and seizure of the fenced curtilage of petitioner's private dwelling, while restraining the petitioner under armed threat of arrest and incarceration, was authorized by state statutes.

I. DECISIONS OF THE SUPREME COURT CLEARLY ESTABLISH THAT THE MATERIAL ACTS OF THE RESPONDENTS ARE UNLAWFUL.

The essential predicate to considering a party eligible for qualified immunity is whether that party acted materially within his discretionary authority [***Harlow v. Fitzgerald***, *457 U.S. 800, 817*]. The District Court finds the respondents eligible [**A-II-5**], and the Eleventh Circuit affirms [A-I-7]. The Courts below base their conclusions on the record, which shows that respondents, in motions for dismissal and in answer briefs in appeals, that they rely on ***Fla. Stat. §581.031(15)(a)*** for authority to conduct an inspection and on ***Fla. Stat. §581.184(7)*** for authority to have the sheriff's assistance in gaining access. [see p.vii, above].

As the Eleventh Circuit has noted [**A-I-4**], ***Fla. Stat. §581.031(15)(a)*** [see above] has no language stating or implying that agricultural inspections may be conducted without warrants or consent of the inhabitants. Nevertheless, the Eleventh Circuit finds it reasonable for respondents to have assumed that there is an exception to the ***Fourth Amendment*** implicit therein [**A-I-9**]. The petitioner has argued, unsuccessfully, that this section does nothing more than provide statutory grounds for agricultural inspectors to make application for a warrant where consent is denied. In that vein, petitioner has argued that ***§581.184(7)*** provides statutory means by which the sheriff may assist agricultural agents in lawfully gaining access to private lands, which would, as a matter of Florida law [***Fla. Stat. §933.21*** and ***Fla. Stat.§30.15(b)***[1]], require a search warrant and service by a sheriff or his deputy.

Only sheriffs and their deputies have authority to serve warrants, so it is only reasonable that the assistance authorized in ***§581.184(7)*** be lawful assistance not contrary to

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1. "An inspection warrant shall be issued only upon cause, supported by affidavit, particularly describing the place, dwelling, structure, or premises to be inspected and the purpose for which the inspection is to be made. In addition, the affidavit shall contain a statement that consent to inspect has been sought and refused or a statement setting forth facts or circumstances reasonably justifying the failure to seek such consent Owner-occupied family residences are exempt from the provisions of this act." ***Fla. Stat. §933.21*** (2000)

"Sheriffs, in their respective counties, in person or by deputy, shall: ... (b) Execute other such writs, processes, warrants, and other papers directed to them, as may come to their hands to be executed in their counties." ***Fla. Stat. §30.15(b)*** (2000)

other statutes or to the state or federal constitutions.

The Florida legislature had provided lawful, constitutional means for state agents, operating under lawful authority, to gain entry to the petitioner's premises, if they could meet the legal standards for acquiring a valid warrant. The respondents did not bother to use lawful means, for whatever reason. The means they chose were unlawful, and that unlawfulness was clearly established at times material.

Addressing the question whether administrative inspections are exempt from the ***Fourth Amendment***, the Supreme Court has found that, where no rules governing inspection procedures are in place, "*the Fourth Amendment and its various restrictive rules apply.*" [***Colonnade Catering Corp. v. United States,*** *397 U.S. 72, 77*]

It is, therefore, not within the discretionary authority of agricultural agents and deputies sheriff to jointly conduct an unconsented, warrantless search of the petitioner's curtilage under armed threat of arrest and incarceration. Accordingly, the respondents cannot be eligible for qualified immunity from the petitioner's claims.

As to the discretionary authority of the respondents agricultural agents, their activities authorized under the Citrus Canker Eradication Program [CCEP] are regulated under the ***Florida Administrative Code, §5B-58.001*** [see **A-III-1**, et.seq.], titled Citrus Canker Eradication [hereinafter, the CODE].

The CODE prescribes the procedures to be followed in enforcing the CCEP. It expressly limits entry of agents to properties "*where citrus canker is known to exist or ... which have been exposed to citrus canker.*" **[A-III-2, ¶(2)]** Agents are not authorized by the CODE to enter any property not known to contain or be exposed to citrus canker. Respondents searched the petitioner's property, trying to determine whether it were containing or exposed to citrus

canker, but they did so in an unlawful way. The CODE further provides that properties containing or exposed to citrus canker be quarantined, and the boundaries of the quarantine area be determined by "*risk assessment*" procedures; after which certain "*control procedures*" are to be implemented. If the property is not quarantined, there is no authority to conduct risk assessment or control procedures. The control procedure adopted by the CCEP is destruction of all citrus horticulture within a 1900-foot radius of any infected tree [see ***Fla. Dep't of Agric. & Consumer Servs. v Haire***, *836 So.2d 1040, 1043-44*]. The CODE requires certain notifications and documentation to precede any control procedures, i.e. destruction of citrus trees. It is during the destruction process that the sheriff's assistance may be provided, according to ***Fla. Stat. §581.184(7)***; that section of the statute pertaining to destruction and decontamination procedures, only. There is no statutory or regulatory authority for sheriffs or their deputies to assist CCEP agents during any other phase of the program.

Accordingly, respondents agricultural agents had no authority to enter the petitioner's premises, because they could not know whether it contained or had been exposed to citrus canker and because the petitioner's property was not quarantined. Respondents knew, or should have known, that the DACS's published quarantine maps did not include the petitioner's property and, therefore, that it had not been quarantined. There had been no notifications or documentations made, so the respondents agricultural agents could not have been implementing control procedures, of which destruction is a part. Accordingly, there was no lawful authority to engage respondent deputy sheriff and no authority for the deputy sheriff to assist the agricultural agents.

Because there was no lawful authority for

respondents' material acts, they cannot have been acting within their discretionary authority, and they cannot be eligible for qualified immunity, notwithstanding the Eleventh Circuit's holding to the contrary.

Alternatively, putting aside, for the sake of argument, their lack of discretionary authority, the respondents had fair warning/fair notice that their material acts violated clearly established law found in decisions of the Supreme Court.

The first warning that respondents received was in the statutory oath that all state employees are required to take and which is a matter of public record: "*I ... do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida.*" The ***Florida Constitution, Article I, §12,*** expressly adopts the ***Fourth Amendment*** of the federal Constitution and the decisions of the Supreme Court of the United States interpreting it [see pp. vi-vii, above]. All Supreme Court decisions interpreting the ***Fourth Amendment*** are, therefore, part of the common law of Florida. It is noteworthy that the oath makes no reference to statutes or administrative regulations.

In April of 1984, the Florida Attorney General advised the executive branch that private family dwelling premises could not be entered without either the inhabitant's consent or a duly-issued warrant [see pp. vii-viii, above]. That opinion cited ***See v. City of Seattle,*** *387 U.S. 541*; ***Colonnade Catering Corp. v. United States,*** *397 U.S. 72*; and ***Michigan v. Tyler,*** *436 U.S. 499*, (among others) which cite this Court's ***Camara*** decision [following below].

The ***Camara*** case concerned warrantless entries by municipal inspectors enforcing the City's health and safety codes. Resisters of such searches were subject to arrest. The Supreme Court held that "*one governing principle,*

justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant." [*387 U.S. at 529-30*]

The ***Camara*** court further stated: "*When the right of privacy must reasonably yield to the right to search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.*" [citing ***Johnson v. United States***, *333 U.S. 10, 14*]

The District Court found that the facts of this case are not "*sufficiently similar*" to those in ***Camara v. Municipal Court of the City and County of San Francisco***, *387 U.S. 583* (1967), for the holdings of that case to "*make it clear to a reasonable officer that his conduct was unlawful in conducting a warrantless search*" of the petitioner's curtilage [see A-II-13]. Crafty rewording notwithstanding, it is clear that the District Court employed the same "*materially similar*" standard which this Court rejected in ***Hope v. Pelzer,*** *536 U.S. 730* (reversing a decision of the Eleventh Circuit). Though affirming the District Court's decision, the Eleventh Circuit avoided any reference to the ***Camara*** case. The Eleventh Circuit cited the ***Hope*** decision, but did not refer to the rejection of its "*materially similar*" standard.

Both the District Court and the Eleventh Circuit cite a later state appellate court case[2] involving the same state administrative program (Citrus Canker Eradication Program), wherein the court held that unconsented entries made under that administrative program require duly-issued warrants [**A-I-7; A-II-6, A-II-13, n. 6**]. The Courts below in this case

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2. See ***Florida Dep't of Agric. & Consumer Servs. v Haire,*** *836 So.2d 1040* (2003). The petitioner's case arose June 19, 2000.

find that the ***Camara*** decision, handed down in 1967, did not did not clearly establish that a warrant is required in these circumstances because no state appellate court had so held. But this is not a diversity case; the Erie doctrine does not apply [***Erie R.R. Co. v. Tompkins***, *304 U.S. 64*]. State law does not control resolution of issues governed by federal statute [***Budinich v. Becton Dickinson And Co.***, *486 U.S. 196*]. Federal questions are determined by federal law [***28 U.S.C. 1652***]. This case arose out of violations of the federal constitution and was brought under federal rights of action.

The state appellate ***Haire*** court relied on the holdings of the ***Camara*** decision, in finding the requirement for warrants, and on ***United States v. Dunn***, *480 U.S. 294* (1987), in holding that the ***Fourth Amendment*** protections extend to curtilage. The Courts below in this case concur.

The Eleventh Circuit finds that, because the state appellate court's ***Haire*** decision was untimely, the respondents "*did not have fair warning to notify them that their actions were unlawful.*"

The Eleventh Circuit further stated:

> *Therefore, we conclude that a reasonable official would not have understood that the statutorily authorized citrus canker inspection of private property violated a constitutional right.* [see **A-I-9**.]

Though the Eleventh Circuit states that "*the district court did consider all constitutional law, both from federal and state courts ...*" [see **A-I-9, n. 5**], the record refutes that statement.

In its ***Hope*** decision [above], the Supreme Court reversed a decision of the Eleventh Circuit, finding that:

> *Our opinion in **Lanier** thus makes clear that officials can still be on notice that their conduct violates clearly established law even in novel factual circumstances. Indeed, in **Lanier**, we expressly*

> *rejected a requirement that previous cases be "fundamentally similar." Although earlier cases involving "fundamentally similar" facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with "materially similar" facts.* [*at p. 741*]

The ***Hope*** decision was handed down June 27, 2002. The ***Lanier*** decision [***United States v. Lanier***, *520 U.S. 259*] was handed down March 31, 1997. The District Court dismissed the petitioner's complaint on July 3, 2003, and the Eleventh Circuit affirmed on March 5, 2004.

The Courts below in this case had every reason to follow ***Hope*** and ***Lanier***. That they failed or neglected to do so places them in conflict with relevant decisions of the Supreme Court and establishes cause for the Supreme Court to issue a writ of certiorari to the Eleventh Circuit in this case.

III. RESPONDENTS' TEMPORARY PHYSICAL OCCUPATION OF PETITIONER'S PREMISES TOGETHER WITH THE STATED THREAT OF REPEATED OCCURRENCE VIOLATE THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT.

The District Court holds that the petitioner has not stated a "takings" claim under the ***Fifth Amendment***, either physical or regulatory [**A-II-8,9**]. The Eleventh Circuit affirms [**A-I-7&9**]. This holding is in conflict with decisions of the Supreme Court. The circumstances of this case are apparently novel in that the taking of the petitioner's property is both physical and administrative [Cf.: **A-II-8** and **A-I-7**]. As the ***Hope*** court found, however, that novelty does not exempt those circumstances from the effects of established legal principles [***Hope*** at *741*, citing ***Lanier***]. Respondents

assumed authority under administrative regulations to enter the petitioner's premises, without notice or consent, and to do so whenever they deemed appropriate.

The Supreme Court has held that a show of authority by a law enforcement officer in restraint of a person's liberty is a "seizure", as the Fourth Amendment comprehend that term [***Terry v. Ohio**, 329 U.S. 1, 19, n. 16*]. The Eleventh Circuit acknowledged this holding in ***Courson v. McMillian**, 939 F.2d 1479, 1488*. Thus, when the respondent deputy sheriff made a show of authority and threatened to arrest and incarcerate the petitioner, the deputy "seized" the petitioner. In this state of seizure, the petitioner was deprived of his liberty and any and all use of his property. While the petitioner was seized by the respondent deputy sheriff, the respondents agricultural agents conducted a search of the petitioner's property. All respondents acted materially under color of law. The Courts below find that the petitioner alleged a ***Fourth Amendment*** violation, but that no taking was alleged [see above].

The Supreme Court has held that "*the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'*" [***Loretto v. Teleprompter Manhattan CATV Corp.**, 458 U.S. 419, 433*] Because the petitioner is deprived of his right to exclude the respondents from his premises, he is deprived of his property rights, and the deprivation was effected without due process of law, in violation of the ***Fourteenth Amendment***.

In its decision in ***Nollan v. California Coastal Comm'n.**, 483 U.S. 825, 834,* the Supreme Court held that:

> *We think that a "permanent physical occupation" has occurred ... where individuals are given a permanent and continuous right to pass to and fro, so that the*

real property may be continuously traversed, even though no particular individual is permitted to station himself permanently on the premises.

The ***Nollan*** case involved the uncompensated assertion of a permanent easement across private property as a condition of permitting improvements to the property.

Though the respondents in the case under petition stated intent to return to the petitioner's property within about sixty days of the original event, it is clear that, if their stated interpretation of the law is correct, then they could enter at any time under the auspices of the CCEP, and the petitioner would have no right to exclude them, or any other CCEP agents and their deputy sheriff escorts.

The temporality of the administrative-physical taking of the petitioner's property does not limit the application of the ***Fifth Amendment's*** Takings Clause or of the ***Fourteenth Amendment's*** Due Process Clause. "*'Temporary' regulatory takings which ... deny a landowner all use of his property, are not different in kind from permanent takings for which the constitution clearly requires compensation.*" [***First Lutheran Church v. Los Angeles County***, *482 U.S. 304, 305*]. Restraining the petitioner during the search of his property deprived him of his liberty, thus obstructing his use of that property for the time that the search took place. Because there was no standard for what may be construed as "interference" [see ***Colonnade***, above, p. 3], the respondent deputy presumed authority to arbitrarily arrest and incarcerate the petitioner for any use that he might attempt to make of his property during the pendency of the administrative search.

Under Florida law[3], rights are property. The ***Florida***

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3. "Property means anything of value and includes: ... (b) tangible or intangible personal property, including rights, ..." ***Fla.Stat. §812.012(3)*** (2000)

Constitution, Article I,§9 provides that "*No person shall be deprived of life, liberty, or property without due process of law ...* ". Accordingly, any deprivation of the petitioner's rights is, in effect, a taking of property without due process or just compensation. The Supreme Court has held that "*After* ***Mahon*** [**Pennsylvania Coal Co. v. Mahon**, 260 U.S. 393], *neither a physical taking nor a public use has ever been a necessary component of a 'regulatory taking'* " [***Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency***, *535 U.S. 302*]. Thus, a regulatory taking is possible even without a physical occupation or a public use. In the case under petition, there was physical occupation of the petitioner's real property, done under color of regulatory authority, in addition to the deprivation of rights, which is effectively a taking of intangible property.

The taking of intangible property is also prohibited by the federal Constitution. [***Ruckelshaus v. Monsanto Co.***, *467 U.S. 986, 987*].

Even though the taking in the case under petition is novel, it is a taking under the legal principles pronounced by this Court.

III. THE MATERIAL ACTS OF THE RESPONDENTS VIOLATE THE EQUAL PROTECTIONS CLAUSE.

The law under which color the respondents materially acted is administrative, exercised under the state's presumptive executive police powers to protect the public health, safety, welfare, and morals. It is not in exercise of the state's judicial authority to prosecute crimes.

The respondents essentially presumed to classify the

petitioner's property as "quarantined" in order to exercise colorable authority to administratively enter and search the property for citrus canker. This may be regarded as a constructive classification, inasmuch as it is prerequisite to the respondents' entry onto the petitioner's property, and the actual entry necessitates the classification, whether the classification were made actually or constructively. Based on this classification, the respondents treated the petitioner as if he were not entitiled to the same protections afforded under the Fourth Amendment to all persons.

Finding it "reasonable" that the respondents have relied on ***Fla. Stat. §581.031(15)(a)*** as authorizing a warrantless search [**A-I-9**], the Eleventh Circuit has, in effect, endorsed the "quarantine" classification of the petitioner's property. Implicitly, then, the adoption in the ***Florida Constitution, Article I, §12*** [see pp. vi-vii, above] of Supreme Court decisions on search and seizure, and ***Fla. Stat. §933.21*** [see p. 2, n. 1], may "reasonably" be ignored in state agents' exercise of colorable administrative authority. The Eleventh Circuit acknowledges that the ***Haire*** decision [**A-I-7,8**] voids the classification distinction that it found "reasonable" in this case, but notes the untimeliness. In distinguishing the ***Camara*** case from the case under petition, based on its "special need" analysis [**A-II-13, 14**], the District Court has validated the "quarantined" classification as justifying respondents' material acts, disregarding that such classification was asumed without legal authority.

The District Court cites ***Nordlinger v. Hahn***, *505 U.S. 1,* [**A-II-9,10**] to note that the ***Equal Protection Clause*** does not prohibit classifications, but prevents different treatments of people who are alike "in all relevant respects" [*505 U.S. at 11*, citing ***F.S. Royster Guano Co. v. Virginia***,

253 U.S. 412, 415]. The ***Nordlinger*** court found, following ***Cleburne v. Cleburne Living Center, Inc.***, *473 U.S. 432, and* ***New Orleans v. Dukes***, *427 U.S. 297*, that "*heightened review*" of a classification is due if it "*jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic*". The Courts below in this case find that a ***Fourth Amendment*** violation is sufficiently alleged [**A-I-7; A-II-8**], so, clearly, exercise of the petitioner's fundamental right was jeopardized. As to whether the "quarantine" classification is inherently suspect, the petitioner alleges that his property is outside the area under quarantine [**A-I-3; A-II-3**]; and the Courts below accept well-pleaded factual allegations as true for purposes of considering respondents' motions to dismiss [**A-I-3, n. 2; A-II-2**].

Accordingly, the petitioner hereby argues that heightened review of the constructive classification of his lands, under color of administrative authority, is due.

VI. CONCLUSION

For the reasons above, the petitioner prays for the Supreme Court to issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit on the questions raised above for this case.

By the Petitioner, *Pro Se*
Joseph Lee Grimm

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APPENDIX

DOCUMENT	PAGE
ORDER and OPINION of the United States Court of Appeals for the Eleventh Circuit to AFFIRM DISMISSAL	A-I-1
ORDER and Opinion of the United States District Court for the Middle District of Florida to DISMISS with PREJUDICE	A-II-1
ORDER of the United States Court of Appeals for the Eleventh Circuit to DENY PETITION for REHEARING EN BANC	no #
FLORIDA ADMINISTRATIVE CODE, SECTION 5B-58.001	A-III-1

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-14011
Non-Argument Calendar

[FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT
MAR 05 2004 THOMAS K. KAHN CLERK]

D.C. DOCKET No. 00-00506-CV-FTM-29-DNF

JOSEPH LEE GRIMM,

Plantiff-Appellant,

versus

CHARLES S. SPELL,
a.k.a. Steve Spell,
PETER VASQUEZ, et.al.,

Defendants-Appellees,

JOHN C. MAUSEN,
SCOTT STAMETS,

Defendants.

Appeal from the United States District Court
for the Mddle District of Florida

(March 5, 2004)

Before BLACK, BARKETT and HULL, Circuit Judges

PER CURIAM:

Joseph Lee Grimm appeals pro se from the court's Rule 12(b)(6) dismissal of his second amended complaint brought under 42 U.S.C. §1983. See Fed. R. Civ. Pro. 12(b)(6). Grimm's second amended complaint alleged that defendants Peter Vasquez and Prosscovia Biribawa, agents of the Florida Department of Agriculture and Consumer Services ("DACS"), and defendant Charles Spell, a Deputy Sheriff of Collier County, entered his property to inspect his citrus trees for canker and thereby violated his Fourth, Fifth, and Fourteenth Amendment rights.[1] The district court found that (1) Grimm's second amended complaint stated a constitutional violation under the Fourth Amendment, but not under the Fifth and Fourteenth Amendments, and (2) that defendants Vasquez, Biribawa, and Spell were entitled to immunity on Grimm's Fourth Amendment claim.

I. BACKGROUND

A. FACTS

Grimm resides on a less-than-five acre parcel of land

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1. Citrus canker is a disease that is caused by a bacterial organism that is very harmful to citrus plants and affects the marketability of citrus fruit. For a summary of the history of the citrus canker andFlorida's eradication efforts, see Florida Dep't of Agric. & Consumer Servs. v. Haire, 836 So.2d 1040, 1043-44 (Fla. Dist Ct. App. 2003); Florida Dep't of Agric. & Consumer Servs. v. City of Pompano Beach, 792 So.2d 539, 541-42 (Fla. Dist Ct. App. 2001); State of Florida v. Sun Gardens Citrus, LLP, 780 So.2d 922, 924 (Fla. Dist. Ct. App. 2001).

in Collier County, Florida.[2] Grimm's parcel is outside of any agricultural quarantine area, and no regulated agricultural activities take place there.

On June 19, 2000, defendants Vasquez and Biribawa, DACS agents, entered onto Grimm's premises. Vasquez commenced "handling and examining folliage of [Grimm's] horticulture." Grimm demanded that the defendants produce a warrant authorizing their entry into his premses. When Biribawa answered that they had no warrant, Grimm ordered the two defendants to leave his premises. Vasquez and Biribawa complied.

The next day, June 20, 2000, defendants Vasquez and Biribawa re-entered Grimm's property, but this time they were escorted by defendant Spell, a deputy with the Collier County Sheriff's Department. According to Grimm, Deputy Spell arrived in an official vehicle, brandishing a weapon. The three defendants proceeded as far as a locked gate on Grimm's property.

Grimm heard Spell's police car siren and, upon seeing the defendants, demanded an explanation for their entry onto his property. Spell asserted that the defendants had authority, under Florida Statute §581.031, to perform a warrantless entry onto Grimm's property to inspect for citrus canker and that he was there to escort them to prevent Grimm from interfering with them. Grimm asked to see a warrant, but

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2. In reviewing Grimm's complaint , "we accept all well-pleaded factual allegations as true, and construe the facts in the light most favorable to the plaintiff." Maggio v. Sipple, 211 F.3d 1346, 1350 (11th Cir. 2000).

Spell replied that no warrant was required under this Florida statute.

It is true that the face of Florida Statute §581.031 allows inspections and does not mention a warrant, stating that DACS has the power and duty "[t]o inspect plants, plant products, or other things and substances that may be capable of disseminating or carrying plant pests, noxious weeds, or arthropods, and for this purpose shall have power to enter into or upon any place." Fla. Stat. 581.031(15)(a)(2000). Additionally, under Florida Statute 581.184(9), "[u]pon request of [DACS], the sheriff ... shall provide assistance in obtaining access to private property for the purpose of enforcing the provisions of this section" and also "shall be responsible for maintaining public order during the eradication process and protecting the safety of [DACS] employees, representatives, and agents charged with implementing and enforcing the provisions of this section." Id.

Grimm then attempted to resist the defendants' entry onto his curtilage and Deputy Spell threatened to arrest and incarcerate Grimm for continued failure to cooperate. Grimm then unlocked the gate and allowed the defendants to proceed with their inspection. When the defendants concluded their inspection, they notified Grimm that they would return within sixty days to conduct further inspection.

B. Procedural History

This case is before this Court for the second time. In the prior appeal, this Court noted that the district court assumed, without deciding, that Grimm's second amended complaint alleged a constitution violation, but held any such violation was not clearly established. In the prior appeal, this Court concluded that, in light of Saucier v. Katz, 533 U.S.

194, 201, 121 S.Ct. 2151, 2156 (2000), the district court erred in not first deciding whether Grimm's allegations against Vazquez, Biribawa, and Spell established a constitutional violation. Accordingly, we vacated the judgement in favor of defendants Vasques, Biribawa, and Spell on Grimm's claims under the Fourth, Fifth, and Fourteenth Amendments[3]. We instructed the district court to consider, on remand and in the first instance, whether a constitutional violation occurred, and only then, if a violation of a constitutional right is shown, whether the constitutional right was clearly established.

On remand, the district court held that Grimm's allegations, if proven, would not establish a Fifth or Fourteenth Amendment violation, but would establish a constitutional violation under the Fourth Amendment. The district court then concluded that the defendants had not violated clearly established constitutional law, and that the defendants were therefore entitled to qualified immunity for any Fourth Amendment violations. Grimm timely appealed

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3. Grimm's second amended complaint contained three Counts and named not only the current defendants, Vasquez, Biribawa, and Spell, but also their supervisors, John C. Mausen, Scott Stamets, and Grabriela A. Avilez. In the prior appeal, this Court affirmed the dismissal of Counts II and III as to all defendants and the dismissal of Count I as to Mausen, Stamets, and Avilez. Thus, only Count I of the second amended complaint, as it applies to defendants Spell, Vasquez, and Biribawa, is at issue. Grimm's Fourth, Fifth, and Fourteenth Amendment claims are all in Count I.

again.[4]

II. DISCUSSION

Qualified immunity protects government officials sued in their individual capacities if their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982). "[T]o receive qualified immunity, the public official must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred. If the defendant was not acting within the scope of his discretionary authority, he is ineligible for the benefit of qualified immunity." Lee v. Ferraro, 24 F.3d 1188, 1194 (11th Cir. 2002) (internal quotation marks and citations omitted). "Once the defendant establishes that he was acting within his discretionary authority, the burden shifts to the plaintiff to show that qualified immunity is not appropriate." Id.

The Supreme Court has set forth a two-part test for qualified immunity. "The threshold inquiry a court must take in a qualified immunity analysis is whether [the] plaintiff's allegations, if true, establish a constitutional violation." Hope v. Pelzer, 536 U.S. 730, 736, 122 S.Ct. 2508, 2513 (2002) (citing Saucier, 533 U.S. at 201, 121 S.Ct.at 2156). If a constitutinal right would have been violated under the plaintiff's version of the facts, "the next, sequential step is to ask whether the right was clearly established." Saucier, 533 U.S. at 210, 121 S.Ct. at 2156

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4. We review de novo a district court's dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Kyle K. v Chapman, 208 F.3d 940, 942 (11th Cir. 2000).

On this record, it is clear that the defendants were acting within the scope of their discretionary authority when they inspected Grimm's property. Thus, we examine whether Grimm's allegations state a claim for violation of his constitutional rights under the Fourth, Fifth, and Fourteenth Amendments. As to Grimm's §1983 claims under the Fifth and Fourteenth Amendments, we agree that Grimm's allegations, even if proven, would not establish constitutional violations for the reasons outlined in the district court's order. Thus, we discuss only Grimm's claims under the Fourth Amendment.

A. Constitutional Violation

After review, we conclude (1) that Grimm's allegations in his second amended complaint state a constitutional violation under the Fourth Amendment, but (2) that the defendants are entitled to qualified immunity because it was not clearly established as of June 20, 2000, that it was unlawful for the defendants to enter Grimm's property and inspect exterior plant material for citrus canker.

As mentioned earlier, at the time of the events in this case, Florida statutes allowed defendants Vasquez and Biribawa, DACS agent, to enter Grimm's property and inspect for citrus canker. See Fla. Stat. 581.184(9).

However, in 2003, a Florida appeals court, in Florida Det't of Agric. & Consumer Servs. v. Haire, found that a warrant was required for administrative search of a curtilage for citrus canker. 836 So.2d 1040, 1057 (Fla. Dist. Ct. App. 2003). There, DACS argued that §581.031 did not violate the Fourth Amendment because the intrusion to inspect for citrus canker is so de minimus as to be reasonable and not require a warrant, and, alternatively, because the warrantless

inspection for citrus canker falls within the exigent circumstances exception to any warrant requirement. Id. at 1057-58. The Florida appeals court concluded that DACS is not excused from obtaining a warrant to search constitutionally protected property because the type of emergency or exigent circumstances necessary to dispense with the warrant requirement is not present with regard to citrus canker inspections. Id. at 1057-58.

For the reasons provided in the Haire opinion, we conclude that the Fourth Amendment requires that DACS agents obtain a warrant prior to conducting citrus canker inspections, and thus, that Grimm stated a constitutional violation under the Fourth Amendment.

B. Fourth Amendment Violation Not Clearly Established

The Supreme Court has stated that "the salient question ... is whether the state of the law ... gave [the government officials] fair warning" that their actions were unconstitutional. Hope, 536 U.S. at 741, 122 S.Ct. at 2516 (emphasis added); see Marsh v. Butler County, 268 F.3d 1014, 1031 (11th Cir. 2001)(stating that "fair and clear notice to government officials is the cornerstone of qualified immunity"). "For a constitutional right to be clearly established, its contours 'must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" Hope, 536 U.S. at 739, 122 S.Ct. at 2515 (quoting Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034 3039 (1978)).

As of June 20, 2000, the Florida statutes appeared to authorize the defendants' actions and no Florida appellate court had held that a search warrant was needed under the

circumstances at issue in this case.[5] The fact that courts have since addressed this issue is irrelevant to determining whether qualified immunity applied to the defendants' actions at that time in 2000. Thus, the defendants did not have fair warning to notify them that their actions were unlawful.

Therefore, we conclude that a reasonable official would not have understood that the statutorily authorized citrus canker inspection of private property violated a constitutional right. Hence, Vasquez, Biribawa, and Spell are entitled to qualified immunity because their actions occurred in 2000.

III. CONCLUSION

The district court did not err in finding that Grimm's second amended complaint states a viable Fourth Amendment claim, but that defendants Vasquez, Biribawa, and Spell were entitled to qualified immunity on Grimm's Fourth Amendment claim. In addition, the district court did not err in finding that the allegations of Grimm's second amendment complaint, even if proven, did not establish a violation of the Fifth and Fourteenth Amendments. Accordingly, we affirm.

AFFIRMED

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5. In his brief on appeal, Grimm also argues that the district court erred by relying strictly on state law in determining that there was no clearly established law. However, as the defendants Vasquez and Biribawa's brief points out, the district court did consider all constitutional law, both from federal and state courts, in analyzing whether a Fourth Amendment violation was clearly established as of June 20, 2000.

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

[FILED 2003 JUL -3 AM 10:57
CLERK OF DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT MYERS DIVISION]

JOSEPH LEE GRIMM,
Plaintiff,

vs. Case No. 2:00-cv-506-FTM-29 DNF

CHARLES S. SPELL,
PETER VASQUEZ, and
PROSSCOVIA BIRIBAWA,
Defendants.

ORDER

This matter comes before the Court on remand from the Eleventh Circuit Court of Appeals, issued as a mandate April 4, 2003, to consider whether the plaintiff's allegations under 42 U.S.C. §1983 against defendants Peter Vasquez, Prosscovia Biribawa, and Charles S. Spell, if proven, would establish a constitutional violation and, if so, whether that constitutional right was clearly established at the time of the events in question. (Doc. #86). On April 9, 2003, the Court ordered each of the parties to file a memorandum of law addressing the issues on remand (Doc. #87), which the parties have done (Docs #88, #89, #90).

I.

The issues to be addressed arise within the context of the defendants' Motions to Dismiss the Second Amended Complaint (Docs. #65 66) and the plaintiff's opposition to those motions (Docs. #70, #71). In deciding a motion to dismiss, the Court must accept all factual allegations in a complaint as true and take them in the light most favorable to the plaintiff. Christopher v. Harbury, 536 U.S. 403, 406 (2002). A complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts that would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (footnote omitted); Marsh v. Butler County, Alabama, 268 F.3d 1014, 1022 (11th Cir. 2001)(en banc). To satisfy the pleading requirements of Fed. R. Civ. P. 8, a complaint must simply give the defendants fair notice of what the plaintiff's claim is and the grounds upon which it rests. Schwierkiewicz v. Sorema N.A., 534 U.S. 506 (2002). However, the Eleventh Circuit imposes "heightened pleading requirements for civil rights cases, especially those involving qualified immunity." Cottone v. Jenne, 326 F.3d 1352, 1362 n. 7 (11th Cir. 2003)(citation omitted). Additionally, the pleadings of a *pro se* litigant are held to a less stringent standard than those drafted by an attorney, and therefore must be liberally construed. Trawinski v. United Techs., 131 F.3d 1295, 1297 (11th Cir. 2002). Dismissal is warranted under Fed. R. Civ. P. 12(b)(6) if, assuming the truth of the factual allegations of plaintiff's complaint, there is a dispositive legal issue which precludes relief. Neitzke v. Williams, 490 U.S. 319, 326 (1989); Brown v. Crawford County, Ga., 960 F.2d 1002, 1009-10 (11th Cir. 1992).

II.

The Court summarized the material facts alleged in the Second Amended Complaint (Doc. #60) in its original order of dismissal, but will repeat them here to the extent they are relevant to the issues on remand. Joseph Lee Grimm (plaintiff or Grimm) lives on a less-than-five-acre parcel of land in Collier County, Florida on which no regulated agricultural activities take place and which is outside of any agricultural quarantine area. The parcel contains a dwelling which is fenced in with a locked gate and visually obstructed from the nearest road by "an expanse of foliage approximately 300 feet in depth, preserved by plaintiff." On June 19, 2000, defendants Peter Vasquez (Vasquez) and Prosscovia Biribawa (Biribawa), in the course of their duties as agents of the State of Florida, entered upon plaintiff's property without prior notice or consent. Vasquez proceeded to "handle and examine foliage of plaintiff's horticulture while Biribawa approached plaintiff." When plaintiff asked to see a warrant authorizing entry onto his property, Biribawa responded that they did not have a warrant. Plaintiff then ordered Vasquez and Biribawa to leave the premises, and they left immediately.

On June 20, 2000, Vasquez and Biribawa re-entered plaintiff's property, escorted by defendant Charles S. Spell (Spell), a deputy with the Collier County Sheriff's Department. Deputy Spell was driving a marked Sheriff's Department vehicle and wearing a uniform with nametag and badge, and was "brandishing" a firearm. Vasquez, Biribawa, ans Spell proceeded to a locked gate on plaintiff's property, where they were confronted by the plaintiff. Plaintiff demanded an explanation for their entry upon his lands. Deputy Spell explained that he entered onto the promises pursuant to Florida Statutes §581.031 (authorizing

warrantless entry onto lands for inspection in connection withcitrus canker) to escort Vasquez and Biribawa onto the land
and prevent plaintiff from interfering with their inspection of the land. Plaintiff demanded production of a warrant authorizing entry onto the land, and Deputy Spell stated that no warrant was required under Florida statute. Plaintiff disagreed, and stated that the officers were require by law to obtain a valid warrant to enter lands over the objections of the inhabitants. Deputy Spell then threatened to arrest and incarcerate plaintiff if he refused to admit the agents beyond the locked gate in order to inspect the lands. Plaintiff orally protested, and demanded identification documents from all three. Vasquez, Biribawa, and Spell each produced identification. Plaintiff reluctantly unlocked the gate, stepped aside, and allowed Vasquez and Biribawa to enter. Vasquez and Biribawa then proceeded with the inspection of the lands, after which Vasquez handed papers to plaintiff and said he would return in 60 days for an additional inspection of the land. Plaintiff told the agent they would be denied entry unless they had a valid warrant. Vasquez, Biribawa, and Spell then left plaintiff's property.

III.

Plaintiff sued Vasquez, Biribawa, and Spell in their individual capacities alleging, pursuant to 42 U.S.C. §1983 that the defendants violated his rights under the Fourth Fifth,

and Fourteenth Amendments to the United States Constitution.[1] All defendants raise the defense of qualified immunity in their motions to dismiss.

To be eligible for qualified immunity, defendants must first prove each was acting within the scope of his discretionary authority when the allegedly wrongful act occurred. Wood v. Kesler, 323 F3d 872, 877 (11th Cir. 2003). It is clear from the allegations in the Second Amended Complaint that each individual was acting within the scop of his discretionary authority during the events at issue. As a result, the burden shifts to the plaintiff to show that qualified immunity is not appropriate. Id. at 877.

The Court conducts a two-part inquiry to determine whether qualified immunity is appropriate: First, the Court determines whether the facts as alleged in the complaint, viewed in a light most favorable to plaintiff, show that the government officials' conduct violated a constitutional right. Dahl v. Holley, 312 F.3d 1228, 1233 (11th Cir. 2002), citing Hope v. Pelzer, 536 U.S. 730, 735 (2002) and Saucier v. Katz, 533 U.S. 194, 201 (2002). If no constitutional violation is established, there is no need to go further and the officials prevail. Chavez v. Martinez, 123 S.Ct. 1994, 2000 (2003); Dahl, 312 F3d at 1233.

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1. The Second Amended Complaint contained three counts and named Vasquez, Biribawa, Spell and their supervisors, John C. Mausen, Scott Stamets, and Grabriela A. Avilez. (Doc. #60). The Eleventh Circuit affirmed the dismissal of Counts II and III as to all defendants and the dismissal of Count I as to Mausen, Stamets and Avilez. (Doc. #86). Thus, only Count I of the Second Amended Complaint, as it applies to Spell, Vasquez, and Biribawa, is at issue.

A.

The plaintiff's Second Amended Complaint asserts violation of his Fourth Amendment right against unreasonable searches and seizures. Defendant Spell concedes that the plaintiff's allegations sufficiently state a claim for a Fourth Amendment violation "under the liberal pleading standards applicable to pro se plaintiffs." (Doc. #90, p. 2). Defendants Vasquez and Biribawa contend that plaintiff's allegations do not state a claim for a Fourth Amendment violation. They assert that there would be a Fourth Amendment violation only if there was a warrantless search of a home's curtilage under the Citrus Canker Eradication Program, Florida Dep't of Agric. & Consumer Servs. v. Haire, 836 So.2d 1040 (Fla. DCA 4th 2003)[2], but argue the Second Amended Complaint fails to allege that any portion of plaintiff's property, other than his dwelling, is curtilage and fails to allege that the defendants searched any portion of the curtilage. (Doc. #88, pp. 2-6).

The concept of curtilage is important because the Supreme Court has recognized that Fourth Amendment protections extend to the home's curtilage, i.e., the area immediately surrounding the home, but does not extend to open fields. United States v. Dunn, 480 U.S. 294, 300 (1987); Olmstead v. United States, 265 U.S. 57, 59 (1924). While there is some tension between the heightened pleading requirements of civil rights cases involving qualified immunity and the liberal pleading requirements of a *pro se* litigant, the Court finds that the Second Amended Complaint to allege that a portion of the property surrounding the plaintiff's house

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2. According to the defendants, the Supreme Court of Florida has accepted jurisdiction of Haire and oral argument is set for October 7, 2003. (Doc. #88, p. 1).

is curtilage and that this portion was searched by defendants. As alleged in the Second Amended Complaint, the property is less than five acres, is surrounded by a fence, contains a locked gate, is not used for any regulated agricultural activities, and is visually obstructed from the nearest road by approximately 300 feet of dense foliage preserved by the plaintiff. Although the precise boundaries of the curtilage cannot be determined from the face of the Second Amended Complaint, it is clear that, at a minimum, the curtilage includes the area inside the "locked gate." Cf. United States v. Seidel, 794 F.Supp. 1098, 103-04 (S.D. Fla. 1992) (concluding that two and one-half acres, surrounded by a fence with a locked gate was curtilage despite fact that the defendant used the entire property to grow plants for commercial landscaping purposes). Thus, the Court concludes that the plaintiff has adequately alleged that all the remaining defendants searched a portion of his curtilage during their visit to the property on June 20, 2000, when they demanded that the plaintiff unlock the gate and then entered and proceeded with an inspection of the lands inside the gate.[3] (Doc. 60, pp. 11-15).

Since the Second Amended Complaint adequately alleges a search of the curtilage of the home without a warrant, the Court finds that plaintiff has alleged a Fourth Amendment violation. The Supreme Court has held that an administrative search of a home by municipal health and safety inspectors implicates the protections of the Fourth

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3. For the same reason, the Court concludes that the plaintiff has not adequately alleged that any defendants searched any portion of his curtilage during their visit on June 19, 2000.

Amendment. Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523, 534 (1967). The District Court of Appeals for the Fourth District recently held that the warrantless searches of a home's curtilage by the Citrus Canker Eradication Program violated the Fourth Amendment. Haire, 836 So.2d at 1057. In reaching this conclusion, the Court relied on Camara and concluded that searched conducted pursuant to the Citrus Canker Eradication Program are akin to the types of administrative searches which require a warrant. Id. The Court recognized that Camara specifically excepted the warrant requirements for administrative inspections in emergency situations, such as to seize unwholesome food, but concluded that " [a]lthough there is an 'economic emergency' to the citrus industry from the spread of citrus canker, that does not suggest the type of emergency or exigent circumstance necessary to dispense with the warrant requirement." Id. at 1057-58. The Court agrees with the District Court of Appeals. Thus, the Court concludes that the plaintiff's allegations, if proven, would establish a constitutional violation under the Fourth Amendment.

B.

The plaintiff's Second Amended Complaint can also be read to assert a taking without just compensation under the Fifth Amendment. The Supreme Court has distinguished between two types of Takings Clause cases: physical takings and regulatory takings. Tahoe-Sierra Pres. Council, Inc. v Tahoe Reg'l Planning Agency, 535 U.S. 302, 321 (2002). A physical taking occurs either when there is a condemnation or a physical occupation of the property. Id. at 322; see also Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-36 (1982). A regulatory taking occurs when some significant restriction is placed on an owner's use of his or her

property. Tahoe-Sierra, 535 U.S. at 323. The plaintiff has not alleged that either physical taking of his property has occurred or that a significant restriction has been placed on the use of his property. Thus, the Court concludes that the plaintiff's allegations, if proven, would not establish a violation of the Taking Clause of the Fifth Amendment.

C.

The plaintiff's Second Amended Complaint also an be read to assert due process rights under the Fifth Amendment and the Fourteenth Amendment. The Due Process Clause "requires that a private citizen be given notice and opportunity to be heard before government seizes his or her property." Quik Cash Pawn & Jewelry, Inc. v. Sheriff of Broward County, 279 F.3d 1316, 1322 (11th Cir. 2002) (citing Fuentes v. Shevin, 407 U.S. 67, 80-82 (1972); see also Cryder v. Oxendine, 24 F.3d 175, 177 (11th Cir. 1994) (summarizing elements of due process violation under §1983. The plaintiff has not alleged that the defendants seized any of his property during their inspection of his land. Thus, the Court concludes that the plaintiff's allegations, if proven, would not establish a violation of the Due Process Clause of the Fifth or Fourteenth Amendment.

D.

Finally, the plaintiff's Second Amended Complaint can be read to assert equal protection rights under the Fourteenth Amendment. The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." It "does not forbid classifications. It simply keeps governmental decisionmaker from treating differently people who are in all

relevant respects alike." Panama City Med. Diagnostic Ltd. v. Williams, 13 F.3d 1541, 1545 (11th Cir. 1994) (quoting Nordlinger v. Hahn, 505 U.S. 1, 9 (1992)). To establish a violation of the Equal Protection Clause, the plaintiff must allege and ultimately prove discriminatory motive or purpose. Cross v. State of Ala., State Dep't of Mental Health & Mental Retardation, 49 F.3d 1490, 1507 (11th Cir. 1995) (§1983 case). The plaintiff has not alleged that he was treated any differently in any respect from anyone else in a similar situation by the defendants; nor has he alleged discriminatory motive or purpose. Thus, the Court concludes that the plaintiff's allegations, if proven, would not establish a violation of the Equal Protection Clause of the Fourteenth Amendment.

IV.

Having concluded that the plaintiff's allegations regarding the defendants' search of his property on June 20, 2000, if proven, would establish a constitutional violation under the Fourth Amendment, the Court must now consider whether the defendants' actions violated clearly established constitutional law.[4] The plaintiff bears the burden on this issue. Wilson v. Blankenship, 163 F.3d 1284, 1288 (11th Cir. 1998).

For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

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4. Although the Court addressed this issue in its previous Order, the Eleventh Circuit's Opinion requires the Court to reconsider the issue in light of the Court's conclusion that the plaintiff's allegations, if proven, would establish a constitutional violation under the Fourth Amendment. (Doc. #86, p. 11).

This is not to say that an official action is protected by qualified immunity unless the very act in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." Hope v. Pelzer, 536 U.S. 730, 739 (2002), quoting Anderson v. Creighton, 483 U.S. 635 (1987). Officials are entitled to "fair warning" that their conduct violates established law, but this does not require a previously decided case with materially similar facts. Hope, 536 U.S. 739-40. While there need not be existing precedent materially similar to the plaintiff's case, "the preexisting law must give real notice of practical value to government officials, considering the specific circumstances confronting them, and not just talk of some generalized, abstract intellectual concept." Pace v. Capobianco, 283 F.3d 1275, 1282 (11th Cir. 2002). The "relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier v. Katz, 533 U.S. 194, 200 (2001).

Under the qualified immunity principles summarized above, the specific question is whether, as of June 20, 2000, it was clearly established that it was unlawful for state Department of Agriculture inspectors and/or deputy sheriffs to enter onto private property on which a dwelling was located and which was not being utilized for agricultural purposes and was not within a quarantine area, over the objection of the occupant, and inspect exterior plant material located within the curtilage of the property for citrus canker. The court answers the question in the negative.

The citrus canker history was briefly summarized in Florida Dep't of Agri. & Consumer Servs. v. City of Pompano Beach, 792 So.2d 539 (Fla. 4th DCA 2001), State v. Sun

Gardens Citrus, LLP, 780 So.2d 922 (Fla 2d DCA 2001), and Florida Dep't of Agric. & Consumer Servs. v Haire, 836 So.2d 1040 (Fla. 4th DCA 2003). The Florida Department of Agriculture and Consumer Services administers the Citrus Canker Eradication Program, which aims to eliminate a bacteria that is very harmful to citrus plants and affects the marketability of citrus fruit. The bacteria can spread rapidly, primarily by wind-blown rain. In 1985, citrus canker was discovered in Central Florida, and state and federal authorities took action to combat the bacteria by destroying diseased, as well as healthy, citrus plants. In 1995, citrus canker was found in South Florida. If the bacteria continues to spread, a federal quarantine could be placed on the State, which would effectively shut down the distribution of fresh citrus products to other states or internationally. The Florida Commissioner of Agriculture enacted Rule 5B-58.001, which established a quarantine area, spelled out procedures for treatment and eradication of citrus canker, and prohibited the planting or movement of citrus without the Department's permission. As part of its effort to eliminate citrus canker, the Department is permitted to enter onto property to inspect citrus for signs of the disease pursuant Fla. Stat. Ann. § 581.031 (15)(a).[5] Both

5. Florida law states that
The department has the following powers and duties:
(15) To inspect plants, plant products, or other things and substances that may be capable of disseminating or carrying plant pests, noxious weeds, or arthropods, and for this purpose shall have power to enter into or upon any place an to open any bundle, package, or other container containing, or thought to contain, such material, and to take possession of such material if determined by the department to pose a threat to the agricultural or public interests of the state.
Fla. Stat Ann. § 581.031(15) (2001).

the legislature and the courts have continuously relied upon the state's police power to protect the industry.

At the time of the events here -June 20, 2000 - no Florida appellate court had held a search warrant was needed under the circumstances at issue in this case.[6] Similarly, no Florida appellate court had held that the principles of Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523 (1967), should be extended to the present situation. Further, the Court concludes that the facts of Camara are not sufficiently similar to the facts of the present situation such that it would be clear to a reasonable officer that his conduct was unlawful in conducting a warrantless search of the plaintiff's property. In Camara, the Court addressed a "routine annual inspection for possible violations of the city's Housing Code." 387 U.S. at 525. Further, in Camara, the court specifically noted that a warrantless administrative search was permissible under certain "emergency situations" involving public health issues. Id. at 539; see also United States v. Richards, 638 F.2d 765, 770 (5th Cir. 1981) (citing Camara, 387 U.S. at 523) (noting that warrantless search is justified "when it is made for administrative purposes to satisfy a special governmental need

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6. As explained above, courts have addressed this issue after the time period relevant for the Court's inquiry. E.g., Florida Dep't of Agric. & Consumer Servs. v. Miami Dade County, 790 So.2d 1555 (Fla. 3d DCA 2001) (reversing, on other grounds, Florida circuit court holding that search warrant was needed); Florida Dep't of Agric. & Consumer Servs. v Haire, 836 So.2d 1040 (Fla. 4th DCA 2003) (holding that warrant was required for administrative search of curtilage for citrus canker).

and necessity outweighs the invasion entailed").[7]

As described above in more detail, the State of Florida has determined that a bacteria is spreading among citrus trees, which could effectively shut down the entire fresh citrus industry in the State. Although an administrative search conducted to eradicate an agricultural bacteria posing an economic emergency may not be the same as an administrative search conducted to address serious public health concerns it is also not he same as a routine administrative search to discover housing code violations. In other words, the administrative search at issue falls somewhere between the two extremes described in Camara. The court concludes that this was not clearly established at the time of the events described in the Second Amended Complaint.

Accordingly, it is now

ORDERED:

1. Count I of the Second Amended Complaint (Doc. #60) is dismissed as to defendants Vasquez, Biribawa, and Spell.

2. The Clerk shall enter judgement dismissing this action with prejudice, and close the file.

DONE AND ORDERED at Fort Myers, Florida, this 3rd day of July, 2003.

s/ John E. Steele
JOHN E. STEELE
UNITED STATES DISTRICT JUDGE

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7. In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) the Eleventh Circuit adopted as binding precedent all the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Copies:
Joseph Lee Grimm, pro se
Counsel of record
DCCD
DCLC

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CORRECTED

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-14011

[FILED UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT APR 30 2004
THOMAS K. KAHN CLERK]

JOSEPH LEE GRIMM, Plaintiff-Appellant,

versus

CHARLES S. SPELL,
a.k.a. Steve Spell,
PETER VASQUEZ, PROSSCOVIA BIRIBAWA,
GRABIELLA A. AVILEZ, in their individual capacities,
Defendants-Appellees,

JOHN C. MAUSEN,
SCOTT STAMETS, Defendants.

On Appeal from the United States District Court for the
Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion _____, 11th Cir. 19_, F.2d_). Before: BLACK, BARKETT and HULL, Circuit Judges.

PER CURIAM: The petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

Entered for the Court: /s/ Frank M. Hull UNITED STATES CIRCUIT JUDGE

ORD-42
(12/01)

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Florida Administrative Code (2000)
CHAPTER 5B-58
CITRUS CANKER

5B-58.001 Citrus Canker Eradication

(1) Definitions. For the purpose of this rule, the definitions in Section 581.011, Florida Statutes, and the following definitions shall apply:

(a) Approved landfill. A landfill that is fenced, that prohibits the removal of dumped material, and that requires that dumped material be covered at the end of every day on which dumping occurs.

(b) Citrus Canker Certificate. A document issued by an authorized representative of the department verifying compliance with the requirements of these rules.

(c) Citrus. All members and any hybrids of the subfamily Aurantioideae, of the family Rutaceae including any plants, plant parts, fruits, seeds and any other parts thereof. For the purpose of this rule the remaining subfamilies, Rutoideae and Toddalioiodeae, of the family Rutaceae are excluded from this definition.

(d) Citrus canker. A bacterial disease of citrus incited by the organism Xanthomonas axonopodis pv. citri, (formerly known as Xanthomonas campestris pv. citri), Asian strain.

(e) Commercial citrus grove. A solid set planting of 40 or more citrus trees.

(f) Commercial citrus-producing area. American Samoa, Arizona, California, Florida, Guam, Hawaii, Louisiana, Northern Mariana Islands, Puerto Rico, Texas, and the Virgin Islands of the United States.

(g) Exposed. Determined by the department to likely harbor citrus canker bacteria because of proximity to infected plants, or probable contact with personnel, or regulated articles, or other articles that may have been contaminated

with bacteria that cause citrus canker, but not expressing visible symptoms.

(h) Infected. Haboring citrus canker bacteria and expressing visible symptoms.

(i) Regulated articles. Any article capable of transporting or harboring citrus canker; including:
1. Trucks, tractors and all other equipment used in the quarantine area for the production, cultivation, harvesting, processing and packing, and transportation of citrus or regulated articles. 2. All lawn and garden tools and nursery equipment used in the quarantine areas. 3. Plant clippings and lawn and yard debris from the quarantine area.

(2) Purpose. This rule is enacted to prevent the spread of citrus canker and to eradicate citrus canker within the State of Florida. To accomplish that purpose, this rule declares citrus canker to be a plant pest and a nuisance, establishes a quarantine areas, establishes eradication and control procedures, prohibits the removal of citrus nursery stock or citrus nursery plants or plant products from the quarantine areas, regulates the sale of citrus fruit originating in the quarantine area, identifies regulated articles, and provides for entry of authorized representatives upon properties where citrus canker is known to exist or upon properties which have been exposed to citrus canker.

(3) Declaration of citrus canker as a plant pest. Pursuant to Section 581.031(6), Florida Statutes, citrus canker, is declared to be a plant pest and a nuisance capable of causing serious damage to citrus. Any citrus, or any other regulated article capable of transporting or harboring citrus canker and therefore capable of spreading the disease is also declared to be a nuisance.

(4) Quarantine area. An area around a site where an infestation of citrus canker is known to occur will be

quarantined. The geographical boundaries of the quarantine area shall be established by risk assessment procedures and will be published in a major newspaper of general distribution in each area affected and through other appropriate media. Risk assessment procedures will consider the agressiveness of the pathogen in the field, the level of disease inoculum, the location and spatial distribution of infected and exposed plants, the variety and type of plants, the risk of spread to areas growing citrus commercially, maintenance practices, and other relevant information. An area shall be released from quarantine provided no detections of citrus canker have occurred during a minimum two-year period of intensive survey and a declaration that citrus canker has been eradicated from the area.

(5) Control procedures.

(a) Risk Assessment. The department shall perform risk assessment procedures in the quarantine area to determine the steps necessary to eradicate, control, and prevent the dissemination of citrus canker. Risk assessment procedures will consider the aggressiveness of the pathogen in the field, the level of disease inoculum, the location and spatial distribution of infected and exposed plants, the variety and type of plants, the risk of spread to areas growing citrus commercially, maintenance practices, and other relevant information.

(b) Control Procedure Documents. The control procedures shall include the preparation of the following documents for each piece of property potentially harboring infected or exposed citrus. A report verifying the presence of, or exposure to, citrus canker through either a laboratory or field diagnosis. 1. A report verifying the presence of, or

exposure to, citrus canker through either a laboratory or field diagnosis. 2. A written inventory including size, condition, and variety of citrus located on the infected or exposed property. 3. A map of the infected or exposed property with the location of citrus subject to control action. 4. A recommendation for control action.

(c) Immediate Final Orders. The Department shall issue an Immediate Final Order stating the quarantine and control methods to be implemented on the infected or exposed citrus located on the property. A copy of the citrus canker diagnostic report, inventory, map, and recommendation referred to above will be attached to each respective Immediate Final Order. The Immediate Final Order will be provided to each property owner. If provided by personal delivery, the person making the delivery of the Immediate Final Order shall note on the order the date and time of delivery, the name of the recipient of the Order and the name of the person delivering the Order. If provided by mail, the Immediate Final Order shall be sent certified mail return receipt requested. The Immediate Final Order shall be immediately appealable or enjoinable. If the property owner is in agreement and signs the waiver accompanying the Immediate Final Order, control measures in accordance with risk assessment procedures shall proceed. If the property owner refuses to sign the waiver, then control measures mandated by risk assessment procedures shall begin no sooner than five days from the property owner's receipt of the Immediate Final Order. Immediate final orders are not required for control action in commercial citrus groves provided the owner agrees voluntarily to the control action and enters into an agreement not to sue with the department.

(d) Property File. The department shall maintain a property file for each separate piece of property. The file shall contain those documents that were required to be prepared

for risk assessment and the following: a copy of the Immediate Final Order with all attachments, a map identifying the location of infected or exposed citrus and the type of control action taken.

(6) Movement of citrus nursery stock or citrus plants.

(a) The movement or planting of citrus nursery stock, citrus plants or plant parts in the quarantine area is prohibited with the exception of citrus nursery stock planted in a commercial citrus grove as recommended by risk assessment procedures.

(b) Citrus nursery stock may move through the quarantine area for planting outside the quarantine area provided it is completely covered or enclosed in containers or in a compartment of a vehicle during movement. The shipment must be accompanied by an invoice denoting a purchaser outside of the quarantine area.

(7) Movement of citrus fruit originating within the quarantine area. Notwithstanding Subsection (6) of this rule, citrus fruit originating within the quarantine area may be moved from or within the quarantine area upon obtaining a citrus canker Citrus Fruit Harvesting Permit, Revised 6/99, DACS-08123 (formerly PI-123), from the Citrus Canker Program, 3027 Lake Alfred Road, Winter Haven, Florida 33881, and incorporated herein by reference, and be in compliance with the following requirements:

(a) The grove producing the fruit has been inspected by the department and found to be free of citrus canker. Groves must be mowed and otherwise maintained to facilitate inspection.

(b) The fruit has been treated in accordance with subsection (11) of this rule.

(c) The fruit is not destined for a commercial citrus -

producing area which is prohibited by the USDA in 7 CFR 301.75.

(d) All citrus harvesters, haulers, packers, and processors operating in the quarantine areas or handling regulated articles from the quarantine areas must sign a compliance agreement, DACS-08031, effective 5/99, and incorporated into this rule by reference. A copy of DACS-08031 may be obtained from the Citrus Canker Program, 3027 Lake Alfred Road, Winter Haven, Florida 33881.

(e) All movement of bulk fruit must be with a limited permit, DACS-08156, effective 6/99. A copy of DACS-08156 may be obtained from the Citrus Canker Program, 3027 Lake Alfred Road, Winter Haven, Florida 33881.

(8) Retail sale of citrus fruit. All citrus fruit sold by retail establishments must originate from outside the quarantine area or be in compliance with section (7). All retail establishments shall maintain records demonstrating compliance with this provision. Any retail establishment failing to maintain the required records shall be subject to stop sale of its citrus fruit.

(9) Movement of plant clippings and lawn and yard debris.

(a) Requirements. Plant clippings and lawn and yard debris may be moved from or within the quarantine area for disposal in an approved landfill or for composting in a recycling facility only under the following conditions:

1. The plant clippings or yard debris must be completely covered during transportation. 2. If mechanical failure prevents unloading of debris, the department shall be notified immediately. This material may not be stored or held overnight outside the quarantine area.

(b) Lawn maintenance operators within the quarantine

area shall demonstrate that they have: 1. Treated regulated articles in accordance with the requirements of subsection (13) of this rule upon departure from any property.
2. Treated personnel in accordance with the requirements of subsection (14) of this rule when departing from any property.

(c) Compliance Agreements. All lawn maintenance operations within the quarantine area shall have a citrus canker certificate for each movement demonstrating compliance with paragraph (a) or must enter into a compliance agreement DACS-08031, effective 5/99, providing for compliance with this rule. All lawn maintenance companies will be provided with a serialized decal upon signing a compliance agreement. Decals shall be prominently displayed on the driver's side of the windshield of the vehicle. All lawn maintenance operators shall on demand provide the department with a list that includes the names and physical address of all clients.

(10) Movement of citrus fruit through Quarantine Area. Notwithstanding subsection (6) of this rule, citrus fruit originating outside the quarantine area may be moved through the quarantine area without a citrus canker certificate provided the following conditions are met:

(a) Citrus fruit must be accompanied by a receipt or bill of lading verifying that the citrus fruit originated outside of the quarantine area;

(b) The citrus fruit must be completely covered or enclosed in containers or in a compartment of a vehicle during movement through the quarantine area, except that covering or enclosure is not required if the citrus fruit is moved through the quarantine areas without stopping except for refueling or for traffic conditions such as traffic lights or stop signs.

(11) Decontamination requirements. All harvesters,

intermediate handlers, grove caretakers, packers, and processors both within and outside of the quarantine area must decontaminate equipment and personnel and sign the applicable compliance agreement, DACS-08031, effective 5/99, and incorporated into this rule by reference. A copy of DACS-08031 may be obtained from the Citrus Canker Program, 3027 Lake Alfred Road, Winter Haven, Florida 33881.

(12) Treatment of citrus fruit. Citrus fruit for which treatment is required by this rule must be treated in accordance with label directions in one of the following ways in the presence of an authorized representative of the department, or at a facility operating under a compliance agreement, DACS-08031, effective 5/99, with the department:

(a) Thoroughly wetted for at least 2 minutes with a solution containing 200 parts per million sodium hypochlorite, with a solution maintained at a pH of 6.0 to 7.5, or

(b) Thoroughly wetted with a solution containing sodium o-phenyl phenate (SOPP) at a concentration of 1.86 to 2.0 percent total solution for 45 seconds if the solution has sufficient soap or detergent to cause a visible foaming action, or for 1 minute if the solution does not contain sufficient soap to cause a visible foaming action.

(13) Treatment of Regulated Articles. Regulated Articles for which treatment is required by this rule must be treated in one of the following ways in the presence of an authorized representative of the department, or at a facility operating under a compliance agreement with the department:

(a) All surfaces must be treated to the point of runoff with 200 parts per million sodium hypochlorite solution. A pH of 6.0 to 7.5 must be maintained in the solution.

(b) All surfaces must be treated to the point of runoff

with 2000 parts per million solution of quaternary ammonium chloride (0.2% OAC)

(c) All surfaces must be washed thoroughly to the point of runoff with a hot water and detergent solution under high pressure maintained at a minimum temperature of 160 degrees F. (71 degrees C).

(d) All surfaces must be thoroughly cleaned with steam with a minimum temperature of 160 degrees F (71 degrees C) maintained at the point of contact.

(14) Treatment of Personnel. Personnel departing from property in the quarantine area shall wash or treat all exposed areas of the body and clothing with an antibacterial soap, wash, spray or other approved solution.

(15) Citrus plants in containers. Maintaining citrus plants in containers within the quarantine areas is prohibited unless they are located in a nursery or nursery stock dealer establishment which is registered with the department. It shall be unlawful for nurseries or nursery stockdealers in the quarantine areas to add citrus plants to their inventory.

(16) Entry of authorized representatives. All owners and occupants of properties on which citrus canker is known or suspected to exist shall permit entry of authorized representatives of the Department of Agriculture and Consumer Services for purposes of inspecting, taking of specimens, or collecting suspect infected fruit, photographing or documenting tree information, applying or supervising treatments, or conducting control activities.

Specific Authority 570.07(21), (23), 581.031(1), (4), (5), 581.091(1), 581.101(1), 581.184 FS. Law Implemented

570.07(2), (13), (21), 581.031(6), (7), (9), (15), (17), 581.083, 581.101, 581.131, 581.141, 581.184, 581.211 FS. History-New 1-17-96, Amended 4-9-96, 5-14-97, 8-19-97, 11-19-97, 11-16-99, 7-17-00.

End of APPENDIX.